HIGH COURT OF UTTARANCHAL, AT NAINITAL

Special Appeal No. 53 of 2004

Sri Narender Prasad Arya
S/o Sri Khem Ram Arya
Administrative Officer Tehsil Bageshwar
District Bageshwar .....Appellant

Versus

1. State of Uttaranchal
   Through the Chief Secretary
   Uttaranchal Shasan, Dehradun
2. Commissioner Kumaon Division, Nainital
3. District Magistrate, Bageshwar
4. S.D.M. Bageshwar/Officer Incharge
   Collectorate, Bageshwar
5. Sri Kunwar Ram Arya
   S/o Sri Nar Ram Arya
   At present working as
   Judicial Assistant Collectorate Office of Collector
   Bageshwar ....Respondents

Delivery of Judgment:- 08th September, 2006

Mr. P.C. Maulekhi learned counsel for the appellant.
Mr. N. C. Gupta learned Standing Counsel for the State.
Mr. Nandan Arya learned counsel for the respondent No.5

Coram: Hon'ble Rajeev Gupta, C.J.
Hon'ble J.C. S. Rawat, J.

1. This special appeal under Rule 5 Chapter VIII of the High Court Rules has been filed against the judgment dated 11.06.2004 passed by the learned Single Sri Kunwar Ram Arya Vs. State of Uttaranchal & others, whereby the learned Single Judge has allowed the writ petition.

2. A writ petition bearing No. 3468(S/S)/2001 was filed by the respondent No.5-Kunwar Ram Arya for the following reliefs:-

(i) to issue a writ, order or direction quashing the order dated 15.06.1999, 08.05.2001,28.06.2001 passed by the

Commissioner Kumaon Mandal, Nainital.

(ii) Issue a writ, order or direction in the nature of mandamus commanding and directing the respondent to promote the petitioner on the post of Administrative Officer in the pay scale of Rs.5500 to 9000/- from the date of his junior is promoted dated 28.06.2001.

(iii) Issue a writ, order or direction in the nature of mandamus commanding and directing the respondent to declare the petitioner senior to the respondent no.5 & 6.

(iv) Any other writ or direction which this Hon'ble Court may deem fit and proper under the circumstances of the case.

(v) Cost of the writ petition be awarded to be petitioner

3. Admittedly, the petitioner-Kunwar Ram Arya (now 'respondent no.5 in special appeal) was appointed as 'Junior Clerk' in the Tehsil Champawat on 04.11.1969. He was promoted on 06.11.1992 as Varisth Sahayak whereas Narender Prasad Arya (appellant in this special appeal) was promoted on the post of Varisth Sahayak on 02.01.1996. Time to time, the District Magistrate had issued the seniority list of the employees. On 13.09.1997 a new district known as 'Bageshwar' was carved out from the district Almora. After creation of district Bageshwar, the petitioner-Kunwar Ram Arya and the appellant-Narender Prasad Arya (who was respondent no.5 in the writ petition) were transferred

from the district Almora to district Bageshwar on the basis of the option submitted by them. While transferring the employees from Almora to Bageshwar, the Commissioner Kumaon Mandal made it clear that the seniority of the transferred employees would not be affected. On 14.07.1998 the District Magistrate, Bageshwar had prepared a gradation list of the employees working in the clerical cadre in the Collectorate of district Bageshwar and the pay scales of the petitioner-Kunwar Ram Arya as well as Narender Prasad Arya (respondent no.5 in the writ petition) was shown in the pay scale of Rs.4000-6000/-. In the gradation list, the petitioner-Kunwar Ram Arya was shown at serial no.1 while the appellant-Narender Prasad Arya was shown at serial no.2. Narender Prasad Arya had filed an objection against the gradation list and the said objection was decided by the District Magistrate maintaining the seniority of the petitioner at serial no.1. Feeling aggrieved by the order of District Magistrate placing the petitioner senior to the respondent no.5, Narender Prasad Arya (respondent no.5) preferred a representation before the Commissioner Kumaon Division. The Commissioner vide order dated 15.06.1999 allowed the representation of the respondent no.5 and declared the respondent no.5-Narender Prasad Arya Senior to the petitioner. Pursuant to the said order, the District Magistrate, Bageshwar vide order dated 6.7.1999 issued a separate seniority list in which the petitioner was shown at serial no.4. Feeling aggrieved by the order dated 6.7.1999, the petitioner has filed a review application before the Commissioner. The Commissioner, Kumaon Mandal,

Nainital rejected the review application of the petitioner and declared Narender Prasad Arya senior to the petitioner. On the basis of the Commissioner's order, the appellant-Narender Prasad Arya and Bipin Chandra Karnatak *(respondent no.5 & 6 in the writ petition respectively)* were promoted on the post of Administrative Officer. Feeling aggrieved by this, the petitioner-Kunwar Ram Arya had filed the writ petition before this Court.

4. After hearing the parties, the learned Single Judge had held that the petitioner-Kunwar Ram Arya *(now the respondent no. 5 in special appeal)* was allowed to join on 14.11.1969 while Narender Prasad Arya joined on 06.12.1969. While determining the seniority, the petitioner was not considered for promotion on the post of Administrative Officer on the ground that the petitioner was junior to Narender Prasad Arya. Kunwar Ram Arya-petitioner had been treated to be the junior to Narender Prasad Arya *(respondent no.5 in the writ petition)* on the ground that the appointment of the petitioner was against temporary post, therefore, his services could not be counted for reckoning the seniority during the time the post was temporary. The decision of treating the petitioner to be junior to Narender Prasad Arya is contrary to the settled principle of law that if a regular appointment is made in accordance with rules against the temporary vacancy that will be substantive appointment if a regular appointment is made in accordance with rule against the temporary post. The learned Single Judge further held that the petitioner is senior to Narender Prasad Arya. Ultimately, the learned Single Judge has allowed the writ petition and has directed the respondents to consider the case of

promotion of Kunwar Ram Arya-the petitioner within a period of one month. Feeling aggrieved by the order of the learned Single Judge, the appellant-Narender Prasad Arya, who was respondent no.5 in the writ petition, has filed the present appeal.

5. We have heard learned counsel for the parties.

6. Learned counsel for the appellant contended that no notice for appearance in the writ petition No.3468(S/S)/2001 was received by Narender Prasad Arya and as such the appellant-Narender Prasad Arya (respondent no.5 to the writ petition) could not file his counter affidavit in the writ petition. The writ petition was allowed against him without giving an opportunity of hearing to the appellant. While hearing the writ petition on 01.08.2001, the Court had directed to issue the notices to the opposite parties. But, no steps for service of the notices was taken by the petitioner-Kunwar Ram Arya in the writ petition. Thereafter, the writ petition was admitted for hearing on 23.04.2004 and notices were directed to be issued to the opposite parties. Inspite of the admission of the writ petition, the petitioner had not taken steps for service upon the private respondents and the notices could not be sent to the private parties i.e. Narender Prasad Arya and Bipin Chandra Karnataka (respondent no.5 & 6 respectively in the writ petition). It is further revealed from the record that the impugned order was passed against Narender Prasad Arya *(respondent no.5 in the writ petition)* without service of the notice upon him. The impugned order directly affects the rights of Narender Prasad Arya and Bipin Chandra Karnataka *(respondent no.5 & 6 in the writ petition).* It is also revealed from the record that the

District Magistrate had prepared the seniority list in which Kunwar Ram Arya was shown at serial no.1 and Narender Prasad Arya was shown at serial no.2 and B.C. Karnataka was shown at serial no.3. It is further revealed from the record that the order of the Commissioner placed Narender Prasad Arya and Bipin Chandra Karnataka *(respondent no.5 & 6 respectively in the writ petition)* senior to the petitioner-Kunwar Ram Arya and consequently they had been promoted as Administrative Officer. Learned counsel for Kunwar Ram Arya could not demonstrate us from the record that the notices were served upon the respondent no.5 & 6. The rights of Narender Prasad Arya and Bipin Chandra Karnataka *(respondent no.5 & 6 respectively in the writ petition) were affected* by the impugned order passed by the learned Single Judge. Before passing the impugned order, the proper opportunity of hearing should have been afforded to the respondent Nos.5 & 6 to the petition. In absence of the knowledge of the writ petition, Narender Prasad Arya could not appear and he could not file his counter affidavit in the writ petition.

7. It is, therefore, evident that the order passed by the Commissioner has been quashed without affording an opportunity of hearing to respondent nos.5 & 6 to the petition. We have no option but to remand the matter for hearing and decision afresh after affording due opportunity of hearing to the respondent Nos.5 & 6. We have also noticed that Bipin Chandra Karnataka, who was the respondent no.6 in the writ petition, had not been arrayed as a party in this Special Appeal. Though, we are not making any adverse order against Bipin Chandra Karnataka and we are only remitting the matter to the learned Single Judge to decide afresh so that no

prejudice would be caused to Bipin Chandra Karnataka. However, it is made clear that the petitioner now will take proper steps for service of notices of the writ petition on the private opposite parties so that the service of notice may be affected upon the private parties i.e. Narender Prasad Arya and Bipin Chandra Karnataka respondent nos.5 & 6 respectively.

8. In view of the foregoing discussion, the appeal is allowed. The impugned order dated 11.06.2004 passed in Civil W.P. No.3468(S/S)/2001 is hereby set aside. The case is remitted for hearing and decision afresh after affording the due opportunity of hearing to the parties.

9. List the W.P. No.3468(S/S)/2001 on 18.09.2006 before the appropriate Single Bench. The parties are directed to appear before the said bench on 18th September, 2006.

10. Parties shall bear their own costs of both the courts.

(J.C.S.Rawat, J.) (Rajeev Gupta, C.J.)

Dated 08.09.2006
LSR